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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 399.

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

MRS. OLIVIA COX LUNSFORD, as Administratrix of the Estate of J. M. COX, Deceased, *Respondent*.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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SUPPLEMENTAL BRIEF FOR PETITIONER.

Respondent's main brief has been filed somewhat in advance and copies were furnished us in advance of filing. Accordingly, this brief is in the nature both of a supplemental brief and of a reply to respondent's main brief.

We do not here repeat the formal and jurisdictional parts already set out in the brief in support of petition for certiorari.

Jurisdiction Not Affected by the Fact That There Were two Grounds Found to Support the Judgment Below. Both are Federal Grounds.

Respondent's brief in opposition to certiorari (pp. 1-2, 10) and her main brief (pp. 2, 10) seem to lay considerable stress on the fact that the trial court, affirmed in both respects by the Court of Appeals, submitted the case to the jury on two different causes of action: first, a cause based on alleged negligence, under the Federal Employers' Liability Act, in maintenance of track and roadbed; second, a failure of Wright's Little Watchman to stop the train after the derailment of the front truck as constituting a violation of the Boiler Inspection Act* imposing absolute civil liability on respondent as for violation of an *absolute duty* imposed by that Act.

What conclusion respondent would draw from this duality of causes or theories of the action it is difficult to discover. It would seem that respondent, without invoking it expressly, is seeking to suggest the application of the well settled rule of this Court that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, jurisdiction of this Court fails *if the non-federal ground is independent of the federal ground and is adequate to support the judgment. Fox Film Corp.* v. *Muller,* decided Dec. 9, 1935; *McCoy* v. *Shaw,* 277 U. S. 302; *Petrie* v. *Nampa & M. Irrig. Dist.,* 248 U. S. 154; *Enterprise Irrig. Dist.* v. *Canal Co.,* 243 U. S. 157, 163-165; *Eustis* v. *Bolles,* 150 U. S. 361; *Klinger* v. *Missouri,* 13 Wall. 257, 263.

But that rule has no application here, for here there was no non-federal ground to support the judgment. All questions here are federal questions. The first cause of action, predicated on negligence, was under the Federal Employers' Liability Act and all questions of negligence, sufficiency

*The Act of February 17, 1911, 36 Stat. L. 913, as amended by the Act of March 4, 1915, 38 Stat. L. 1192, by the Act of June 7, 1924, 43 Stat. L. 659, and by the Act of June 27, 1930, 46 Stat. L. 822—(45 U. S. C. 22-34).

of evidence and proximate causation were federal questions, just as much as were the questions under the Boiler Inspection Act arising out of the second cause of action.

The Questions Under the Boiler Inspection Act Cannot be Disentangled from Those Under the Employers' Liability Act, as Support for the Judgment.

The trial judge (R. 137-139, 140-151) submitted the cause to the jury both on the theory of negligent condition of track as proximately causing the derailment and death and on the theory that the failure of Wright's Little Watchman to stop the train after the initial derailment was a violation of the Boiler Inspection Act and the breach of an absolute duty under that Act, resulting in liability regardless of fault. The jury were authorized by the charge to find a verdict against petitioner on either one or both of those theories. Under the law of Georgia the jury does not answer particular issues or identify facts found or theories of liability applied. The verdict is general, not special. In this case it reads (R. 40):

> "We, the jury, find for the plaintiff in the sum of Five Thousand ($5,000) Dollars."

The result is that no court, no one reviewing the record, can say whether the liability was imposed on a finding that negligent track conditions caused the death or on a finding that a violation of the charged absolute duty under the Boiler Inspection Act was the cause, or whether the jury based its ultimate finding on a combination of the two.

For this reason it is the well-settled law of Georgia that where a case is submitted to a jury on more than one theory an erroneous instruction on one is reversible error even though there was no error in submitting the other, since it cannot be known on which the jury based its verdict. See

Lamb v. *Perry*, 18 Ga. App. 133, and cases cited in footnote below.*

Under this settled law of Georgia, had the Court of Appeals of Georgia agreed with petitioner that there was error in charging the federal law under the Boiler Inspection Act, on the Wright's Little Watchman branch of the case, it would undoubtedly have reversed and granted new trial in spite of its holding that there was sufficient evidence to support the verdict on the branch asserting negligent track conditions. In *Lamb v. Perry, supra*, where a suit was brought on two counts, the judgment was reversed because the lower court erred in submitting one of the counts and because reversal was necessary for the reason, as the court said, "that it cannot be ascertained upon which count of the petition the recovery was based."

This was not done here because the Court of Appeals below held there was no error as to either branch of the case.

We think our questions here raised under the Boiler Inspection Act are meritorious. There can be no doubt that they are adequately raised.

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*Thus, where a statute is charged which the evidence shows to be inapplicable, it is generally held to be calculated to mislead and confuse the jury and to require a new trial. *Mitchell* v. *Langley*, 148 Ga. 244; *Blackwell* v. *Partridge*, 156 Ga. 119 (5), 130-131.

Where instructions are given not warranted by the evidence and calculated to confuse and mislead the jury, the error requires a new trial. *Central Ga. Power Co.* v. *Cornwell*, 139 Ga. 1 (2-a).

Instructions which under the evidence are inapplicable are erroneous and require the grant of a new trial. *Boyd* v. *Boyd*, 173 Ga. 139; *May et al.* v. *Leverett et al.*, 167 Ga. 205 (5); *Sapp* v. *Odom et al.*, 165 Ga. 437 (5-8); *Mobley* v. *Merchants & Planters Bank*, 157 Ga. 658 (3); *Ward* v. *The State*, 39 Ga. App. 570; and many other cases.

No instructions should be given upon any theory which is unsupported by the evidence: *Burley* v. *The State*, 158 Ga. 849; *Betts* v. *The State*, 157 Ga. 844; *Louisville, etc., R. Co.* v. *Pounds*, 50 Ga. App. 611 (1).

If, by the giving of inapplicable instructions, the jury might reasonably be drawn away from the true issues in dispute, to the prejudice of a party, the error is not harmless and a new trial should be granted. *Commercial Bank of Jasper* v. *Dasher*, 24 Ga. App. 736.

Where an issue, though raised by the pleadings, is not supported by the evidence, it is error to charge thereon, and a new trial should be granted. *Investors Syndicate et al.* v. *Thompson et al.*, 172 Ga. 203, 204.

There was No Substantial Evidence that Negligent Track Conditions Existed or that Such Conditions Proximately Caused the Death.

There is no disagreement between the parties as to the fact that the initial derailment of the front truck wheels occurred just opposite the negro church and just after they struck the rock placed on the track by the nine year old negro child, that the locomotive continued for seven-tenths of a mile with the derailed front truck wheels striking the cross ties from time to time, that there was nothing unusual in noise or feeling in the operation to indicate to any one on the train that the front truck derailment had occurred until the locomotive reached the first left hand switch near Bremen (R. 46), that a noise was heard by the fireman at the left hand switch and that momentarily thereafter the final derailment was caused by the derailed truck wheels (which had derailed to the right of the rails) striking the right hand switch.

Manifestly unless some negligent track condition at the point of initial derailment contributed to cause the initial front truck derailment, or unless some such condition at the point of final derailment contributed to that derailment, then track conditions played no role in the causation. No condition of track between these points, even if negligent, could have been a cause of the casualty, because at all such intervening points the initial derailment had already occurred and the final derailment was not caused until the derailed truck wheels struck the switch. All other wheels of the train had safely ridden the rails from the one point to the other.

It is readily demonstrable that there was no substantial proof sufficient to support a finding that any defective condition of track caused either the initial derailment or the final derailment.

After introducing the testimony of the witness Orr, the photographer, who merely testified to the taking of the

photographs on April 14, 1933, two months after the accident, and that they were correct (R. 42-44), the respondent offered as witness Goree, the fireman (R. 45-54). He gave no testimony as to the condition of the track at the point of initial derailment or of any examination made by him there. As to track condition at the point of final derailment he testified that that derailment completely tore up the track at that point. He said (R. 48):

> "That engine, when it left the rails, as to how it behaved, if you have ever ridden in a wagon over cotton rows where the mules were running, it was just about like it; we were dragging up the rails and cross-ties and everything, so you can just imagine how bad it was."

The photograph Exhibit B (R. 100), offered by respondent, illustrates the track at the point of initial derailment as photographed April 14, 1933 (R. 42), two months after the accident, which happened on February 14, 1933 (R. 7, 45). The photograph shows a track and roadbed in good condition and evidences no condition which could have contributed to the derailment.

Respondent's witness Lunsford, son-in-law of the deceased, gave the principal testimony relied on as to track conditions (R. 54-61). The accident happened on Tuesday, February 14, 1933, and he went to examine the track the following Sunday (R. 54). He saw the mark on the rail opposite the negro church where the flange of the right truck wheel mounted the right rail, effecting the initial derailment, and he saw where the wheels hit the crossties. He saw the smudge on the rail that looked like the flange was running on the rail for about three feet before it got off (R. 55). He gave no testimony as to any defective condition of the track discovered by him at either point on that visit.

This witness then revisited the scene in company with Orr, the photographer, he says on April 10, 1933 (R. 55),

Orr says on April 14 (R. 42). In any event it was about two months after the accident. Lunsford figured largely in the photographs, pointing out the point of initial derailment (R. 102), pointing to marks made by the wheels on the crossties between the two derailment points (R. 104, 106, 113, 114, 115), pointing to a spike not driven entirely down, the location being on the outside of the right-hand rail of the passing track where the final derailment occurred (R. 108).

The track was completely torn up at the point of final derailment, as testified by the fireman, *supra.* The photograph, Exhibit R (R. 116), offered in evidence, shows the locomotive lying on its side, taken just after the accident and before the wreck was cleared. It shows indisputably the condition of the track at the point of final derailment just after the occurrence. Rails and crossties were scattered in every direction and the track was destroyed as a track. The track had to be completely rebuilt thereafter, before railroad operations could be resumed, and it was a subsequently built track (at the point of final derailment) which Lunsford examined and in which he found a spike or spikes not driven down. This, of course, has no significance as to what the condition was prior to and at the time of the accident. It was probably the result of haste in relaying the track to put it into operation after the wreck.

The only testimony of the witness Lunsford seeking to show any defective track condition anywhere near the point of initial derailment (R. 55-56) was his testimony in connection with photograph referred to by him as No. 4 (Exhibit E, R. 103) and described by him as being a close-up photograph of three crossties at the point of initial derailment. Although he admitted on cross-examination that he had never had any railroad experience and that he didn't "know a thing in the world about railroad construction," that he had never paid any attention to any railroad track conditions anywhere else (R. 59), that he had never had any experience in determining what was a good sound tie

(R. 60), yet, on direct examination, he undertook to give detailed criticism of two of the three crossties shown in the said photograph, taken two months after the accident. He said (R. 55-56):

> "Those two ties looked like they were pretty badly obliterated and rotten, bursted and marked with the wheel. The left-hand tie looks like the spike came right in that split in the tie. The wood of the tie is missing from under the spikes; there is not but one spike in it and it is missing from that; I mean the plates—it is missing from the whole (hole) on the other side. The rail rests on the plates. There is one spike on the outside in those plates. There is a hole from (for) another spike there; there was one spike missing from every plate. In this picture No. 4, the right-hand ties, there is one spike on the left to the place that joins that tie. As to there being any wood for it to catch in, the spike might catch, but very little, down at the sharp point."

That is the whole of his effort to criticise track conditions attributed to the point of initial derailment. It consisted of finding, two months after the accident, two crossties with worn ends, one of which had a split about where the outer spike went in, and of finding a uniform practice, as shown by this and the other photographs, and as testified by him, of putting one spike instead of two in each tie-plate on the outside of the rail.

There are several conclusive reasons why this was no evidence at all to support a finding that track conditions in any way caused the initial derailment.

First. The crossties referred to were not at or before the point of initial derailment but between that point and the point of final derailment. The scar made by the derailed front truck wheel is apparent on each of the three crossties in the photograph and the witness called attention to the wheel mark on them. The initial derailment had occurred *before the locomotive reached these crossties,*

the whole train passed safely over these crossties and this part of the track. Track conditions here photographed and described could not possibly have had any connection with either initial or final derailment.

Second. There was no effort to show that the rails were not in place or that there had been any spreading of rails at this point. The contrary is conclusively established because the rails on these crossties not only carried safely the train involved in the accident but had been carrying trains in daily operation of this main line track for two months subsequent to the accident.

Third. The practice of using only one spike on the outside of the tie-plate was uniform, standard and proper practice on this railroad. Mr. Madden, General Superintendent of petitioner, testified, and there is no dispute of his testimony on the record (R. 94-95):

> "At the point of derailment, the rails sat on tie-plates and these plates are spiked to the tie. These plates have two openings on each side of rail and there is one spike driven into the tie on each side of the rail. The other openings in the tie-plate are there to be used in the event of any wearing of the other openings. This method of spiking is used on all lines of the Southern Railway Company and is amply sufficient to hold the rail securely and steadily to ties at point of derailment. * * * At the point of derailment, and on each side thereof for a considerable distance where I made a personal inspection thereof, the ties were sound and the spikes were securely driven into the ties up to the head and were holding firmly. There was no looseness or vibration in the rail at point of derailment. In other words, I found the track at point of derailment and all in its immediate vicinity where I made personal inspection in first-class condition and as good as at any point on Southern Railway Company lines, or on any other railroad with which I am familiar.
>
> "In this connection, I might state that this particular piece of track where derailment occurred was rebuilt in 1931, and 100-lb. rail placed on it with first-class ties, tie-plates, spikes, etc., incident to its con-

> struction. In my opinion there was nothing in the conditions of the track at point of derailment which could possibly have caused or contributed to a derailment of the engine. The foregoing examination of the track conditions were made on the afternoon of the day of the derailment and no changes were made in the track, and the train which I went to Bremen on passed over this piece of track, as did all other trains. This derailment caused no damage to the track at point of derailment, and made no repairs of any kind necessary at that point."

Witness Madden, an expert railroad man, was testifying to a personal, official inspection of the very point of initial derailment and a considerable distance on each side thereof, made the afternoon of the wreck. Witness Lunsford, who knew nothing about railroad track conditions, was testifying about conditions on two crossties not at or before the point of initial derailment but at a place between that point and the point of final derailment, a place at which the front truck wheels were already off the track and scarring the crossties.

All the other testimony of witness Lunsford as to observation of track conditions was concerning either (1) points on the track between the point of initial derailment and of final derailment, showing marks on the crossties of the derailed truck wheels (R. 56, 57-58), or (2) conditions at the point of final derailment observed two months after the accident and on track rebuilt thereafter, where the final derailment had completely demolished the track as it had existed before and at the time of the accident (R. 56 bottom 57 top). Nothing in this could have been probative to dispute the testimony of General Superintendent Madden or to support a finding that any defect in track condition contributed to or proximately caused either initial or final derailment.

Respondent then offered the testimony of Holcombe, a deputy sheriff. He saw the pile of sand rock crushed on

the rail, two handfuls of it, the mark where the flange mounted and scarred the rail after hitting the rock and then the mark some distance further where the flange hit the crossties. He traced marks on crossties from that point on (R. 62). He made his examination of ties some time in December, before Christmas, 1933, *ten months after the accident,* and only a month before the trial (R. 64). His only testimony as to track conditions, attempting to suggest any defect at either the point of initial derailment or at the point of final derailment, was the following (R. 63):

> "The cross-ties, as I remember, was practically rotten. They were partly rotten at the church and near this place."

That had no probative value to support a finding that defective track conditions on February 14, 1933, had anything to do with either derailment.

He did see the point of initial derailment on the day of the accident, when he was looking for and found footprints of the boy who put the rock on the track, evidently in pursuit of his duties as deputy sheriff, but the only observation he made at that time was (R. 65):

> "Up at that point of the initial derailment, immediately in front of the church, the track was in no way disturbed up there, out of place or anything of that sort. There was no ties knocked out of place. The only thing I noticed was the imprint of the wheel on the outside of the east rail, and on the inside of the west rail there was some imprint there on the ties."

He did see the overturned locomotive at the point of final derailment on the day of the accident but his only observations at that time were (R. 65-66):

> "Where the engine turned over was up at the right-hand switch. The track was torn up where the train was lying. * * * The rails underneath that engine were torn loose from the ties on the outside, and the ties all thrown in every direction. There were a number of

> cars of the passenger train off the track, and they had twisted and torn the track back there. * * * But I think the only place that the track was torn up was down on the right-hand switch and in that immediate vicinity some seven-tenths of a mile from the point where the trucks were initially derailed. * * * Of course, right where this engine turned over the track was all torn up and for some distance back. I don't think it extended back west of that right-hand switch; my recollection is that it didn't."

Respondent then offered the testimony of Mrs. Lunsford, daughter of the deceased engineer. She testified about her father but nothing about track conditions (R. 66-69).

Respondent then offered the testimony of Cox, the son of the deceased engineer. After testifying about his father's earnings and contributions he testified as to rocks he had found near the point of initial derailment and gave his theory that a rock would not cause a derailment. He gave no evidence as to track conditions (R. 69-74).

Witnesses Goff (R. 74-87), Davis (R. 87-89), Dowdle (R. 89-91) made no examination of the track and gave no testimony regarding it. The nine-year old negro boy, Lowe, testified that he put a rock as big as a man's hand on the track, when he heard the train coming, and stood by to watch the train mash it, and that he saw the front truck wheels off the track after the rock was struck. He of course gave no testimony as to track conditions (R. 91-93).

The only other witness was petitioner's witness Madden, whose testimony as to track conditions we have quoted above.

The foregoing review covers all the evidence in the record regarding track conditions. We submit that it fully supports the statement on petition for certiorari (pp. 6-7):

> "There was some slight evidence in respect thereto (alleged insufficiencies and defects in the track), though the overwhelming weight of the evidence showed that no such insufficiencies or deficiencies existed, or, if they

did exist, that they in no way proximately caused or contributed to the derailment of the front trucks of the locomotive."

We have gone thus fully into this evidence also because it supports the statement on page 3 of petition for certiorari that the evidence shows conclusively that the *causa causans* of the tragedy was the mischievous act of the negro child in placing the rock on the track, and further because it demonstrates that the jury must have based the verdict largely, if not entirely, on the failure of the Wright's Little Watchman to stop the train and prevent the final derailment and on the charge of the trial court imposing absolute duty on petitioner under the Boiler Inspection Act.

The Evidence is Conclusive That the Rock Caused the Initial Derailment and that the Final Derailment was the Proximate Result and Sequence.

It is somewhat surprising to us that respondent should, at this stage of this case, suggest (Main Brief 28) that the testimony of the little negro boy, that he put a rock on the track to see it mashed and that in a few feet after passing over it the front wheels left the track, was false, that the jury disbelieved it, or that it was improbable that the rock could have caused the initial derailment.

Respondent herself, in the second count of her petition (R. 12) alleged that a rock or other object was placed on the track, that the front trucks of the engine struck a rock or other object, and that "upon striking said rock the said front trucks were derailed." She alleged that petitioner was negligent in allowing said rock or other obstruction to be on the track, that the rock had remained on the track for upwards of an hour before this train passed, and that the section foreman was negligent in not finding it.

When the proof came in and showed that the boy only placed the rock on the track when he heard the train coming, the theory of negligent failure to discover and remove the

rock went out of the case and was no further pressed but respondent's own averment that the rock caused the initial derailment remained in the case.

Petitioner, in answer (R. 19), alleged that the front trucks of the engine struck a rock, which had been placed on top of the outside rail on a curve by some miscreant without petitioner's knowledge or consent and just a short while prior to the arrival of the train, and that the rock derailed the front trucks.

Respondent's witness Lunsford testified to the wheel mark on the rail where the wheel mounted it in derailing (R. 55, 59).

Respondent's witness Holcombe, the deputy sheriff, found the "pile of sand rock, crushed on the rail, practically in front of the church, where the train derailed." He said there was not more than two handfuls of the crushed rock (R. 62). He referred to this as "evidences of a crushed rock" (R. 64). He testified that it "was one of these hard, smooth sand rocks" such as you would pick up in a stream (R. 64) and that the amount of ground up rock found by him indicated a rock of such size as an inch and a half thick, maybe two inches wide, and three or four inches long (R. 65). He found footprints, said it had been raining, was muddy, and that he found the footprints leading to the track and away from the track (R. 65).

Respondent's witness Cox, son of the deceased engineer, only visited the scene on Thursday before the trial (R. 70), and the trial was on January 16, 1934 (R. 3), eleven months after the accident. He testified that on that occasion he picked up some other rocks in the vicinity, took them home and hit one with a hammer and it pulverized into sand (R. 70). He had had some railroad experience fifteen years before (R. 69). He testified that he had known trains to run over rocks without derailing and that he had never heard of a rock of any kind knocking a train off a track. He expressed the opinion that a train would crush a rock into

sand and suggested that railroads use sand on tracks to keep the engine from slipping when starting. He suggested that if a wheel should not crush a rock it would knock the rock off the track (R. 71). There was no probative force in this opinion evidence in view of the undisputed evidence of respondent's own witnesses that the rock was struck and crushed and that the physical evidence showed that the front truck wheels were derailed immediately thereafter. On cross-examination this witness of course admitted that he knew nothing whatever about the rock that the train actually struck (R. 73).

The negro boy's testimony is undisputed (R. 91-93). He put the rock, as big as a man's fist, on the track when he heard the train coming, watched to see the train mash it, and saw the front truck wheels go off after they struck it. When the officers came to his house he ran, they measured his track where he ran, they caught him and he confessed and was taken to the "calaboose" (R. 93).

General Superintendent Madden observed the fragments of crushed rock on either side of the rail and testified that, at a point a few feet therefrom on the way to Bremen, the direction in which the train was going, were the first indentations of the wheel flange on the ties. He traced these indentations from that point to the point of final derailment (R. 94). He testified, as hereinbefore quoted, that the track, at and for a considerable distance on both sides of the point of initial derailment, as inspected by him the day of the accident, was in first class condition, tie-plates well spiked, rails secure and steady and with no looseness, movement, vibration or spread, that nothing in the condition of the track could possibly have caused or contributed to the derailment, and that no repairs were necessary after the accident at the point of initial derailment and petitioner's trains continued to operate thereafter over that part of the track without any repairs.

From all the evidence in the record it is inescapably cor-

rect, as stated in petition for certiorari (p. 3), that the evidence conclusively show that the *causa causans* of the tragedy was the mischievous act of the negro child, over whom petitioner had no control and for which petitioner is not responsible. The natural sequence of the initial derailment, undiscovered and undiscoverable by the engineer and fireman, was the striking of the derailed wheels on the rail of the right-hand turnout to the passing track when the engine reached that point running at the usual speed of 40 to 45 miles an hour (Goree, R. 47, bottom).

The State of the Record as to Wright's Little Watchman.

In this state of the record there was no basis for a finding that any track defect caused or contributed to either the initial or the final derailment or to the death of the engineer. On the contrary, it was conclusively shown that the act of the outsider in putting the rock on the track was the cause of the tragedy. To recover, it was necessary for respondent to find some element of liability on petitioner's part *after* the initial derailment and *before* the final derailment. Since track conditions between initial and final derailment could have had no causal effect, and since there was no evidence of any track defect at the point of final derailment which entered or could have been a part of the chain of causation, respondent was forced to rely for recovery practically entirely on the theory that the failure of the mechanical Little Watchman to stop the train after the initial derailment and before the final derailment was a proximate cause of the final derailment and of the death of the engineer, involving absolute liability of petitioner, regardless of due care, under the Boiler Inspection Act.

Laying on one side, for the moment, the Boiler Inspection Act, the Safety Appliance Act, 45 U. S. C. 1-21, had no application. The Safety Appliance Act proper does impose absolute duties as to equipping trains with power driving-wheel brakes (Secs. 1, 9), automatic couplers (Sec. 2), grab

irons or handholds (Sec. 4), drawbars of standard height (Sec. 5), secure sill steps and efficient hand brakes, secure ladders and secure running boards (Sec. 11), fixes these safety appliances as standard equipment unless changed by the Interstate Commerce Commission (Sec. 12), provides for penalties for violation of any such equipment requirements (Secs. 6, 13), abolishes assumption of risk as defense when there is such violation (Sec. 7), makes exceptions as to certain necessary movements but without relieving from civil liability to employees (Secs. 13, 14). The ash pan amendment, 45 U. S. C. 17, mandatorily requires ash pans. Sections 15 and 19 give the Commission power to enforce all these safety appliance requirements. And Section 16 (45 U. S. C. 16) makes the safety appliance requirements of Sections 11, 12, 13, 14 and 15 apply to all carriers to which the first nine sections apply and designates the first nine sections as the "Safety Appliance Acts." Section 20 makes the Ash Pan Act apply to receivers of railroads and Section 21 excepts oil burning and electric locomotives, etc., from the ash pan requirement.

These are the Safety Appliance Acts. There is no suggestion in this case of failure to comply with any of these safety appliance requirements. Nothing in the Safety Appliance Acts requires equipment with a Wright's Little Watchman or with any other device or appliance intended to stop a train automatically if and after front trucks are derailed. The Safety Appliance Acts proper had no bearing on this case.

There follows, in the same chapter of Title 45 U. S. C., the Boiler Inspection Act as amended, Sections 22 to 43. We shall analyze that Act below in the argument. For present purposes we point out that that Act also makes no requirement that a locomotive be equipped with a Little Watchman or with any device or safety appliance of similar character or purpose and that no order of the Interstate Commerce Commission made under authority of the Boiler Inspection

Act has required any such device and the inspection rules of the Commission make no provision for inspection or testing of such device.

We have filed with the Clerk for the convenience of the Court twelve copies of the official volume "Laws, Rules, and Instructions for Inspection and Testing of Steam Locomotives and Tenders and Their Appurtenances" and of the official volume containing the Commission's interpretations, rulings and explanations regarding the laws, rules, and instructions. It was impracticable to reprint these official volumes in larger format.

The Little Watchman was not a federal safety appliance required either by the Safety Appliance Acts, the Ash Pan Act, the Boiler Inspection Act, or the rules of the Commission promulgated under the authority of the latter Act. As we shall show, petitioner was in this case subjected to the same *absolute liability* for the failure of that unrequired, voluntary and experimental device to stop the train after the initial derailment as would have been visited on a railroad for a casualty resulting from failure to have an automatic coupler, power brake or secure grab iron as required by the Safety Appliance Acts, or from failure to inspect in accordance with the Commission's rules any device required by those rules to be inspected under the Boiler Inspection Act or failure of such device to meet the test of such required inspection.

1. The Pleadings as to the "Little Watchman."

Respondent's declaration (petition) clearly presented the theory that the rock derailed the front truck wheels but left the rest of the train on the rails, that the engine continued to function apparently normally for seven-tenths of a mile until it reached the right hand switch, that the derailed front truck wheels then struck the switch, turned to the right and caused the final derailment, and that petitioner was liable as for negligence in failing to inspect the

Little Watchman and have it in condition to operate and because the Little Watchman failed to stop the train between the initial and final derailments. There was no allegation that failure of the device so to function was a violation of the Boiler Inspection Act. The suit was brought solely under the Federal Employers' Liability Act. The allegations were (R. 13-14):

> "9. It is alleged that after striking said rock the front trucks left the rails but the engine was not derailed and continued to function apparently normally to the engineer and fireman was (for) a distance of seven tenths (0.7) of a mile, at which point it struck a switch going out to the right from the track and in so striking the switch the front trucks were turned to the right and were obstructed and caused to be thrust under the engine, and this, together with the large axles and wheels of said trucks and its general obstruction in turning to the right on striking said switch, threw the entire engine off the track and caused it to turn over on its side after running about one hundred yards.
>
> "10. Plaintiff further alleges that said engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances, and other apparatus under the body of said engine extending from the back to the front end thereof, and consisting of cylinders, valves and other apparatus, including air, and which automatically, whenever said front wheels of said engine should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, to apply the air on the brakes of the entire train, and had said appliance known as a watchman been in repair, the speed of said train at said point would have stopped at a couple hundred yards, which would have been automatic and without any effort on the part of the engineer, but the defendant on said occasion, before said engine left Birmingham, Alabama, failed to properly inspect said watchman to see that the same was in condition to work, and plaintiff alleges that the same was not in working or functioning order at the

time of said derailment and the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection under the body of said engine and had ascertained that said watchman was in repair before said trip from Birmingham to Atlanta. The same was not the duty of the decedent who had no concern or part therewith. Had the said watchman functioned, the train would have been stopped long before striking said right hand switch and turning over and the life of the decedent would have been saved."

Petitioner's answer answered these allegations as follows (R. 20-21):

"9th. Answering the ninth paragraph of the second count of the petition, this defendant says that its investigation of the condition after the derailment of said engine showed that after the wheels of said truck under the front end of the engine left the rail it ran for a distance of approximately seven-tenths (7/10) of a mile until it reached a switch going out to the right from the main line, at which point said engine was derailed and turned over. Apparently said front wheels of said truck were off the track from the time the same struck the rock as hereinbefore referred to, and apparently when said front wheels struck the switch they were thrown to one side, and derailed and turned over the engine. Except as answered, the averments of said paragraph can neither be admitted nor denied for the want of sufficient information.

"10th. Answering the tenth paragraph of the second count of the petition, this defendant says that said engine was equipped with an experimental device known as 'Wright's Little Watchman,' which was attached to certain apparatus connected with said engine, and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train. It says that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause tripping of said valve and the application of said brake. It says that the same is merely an experimental device,

which will not operate at all times when said truck wheels leave the track, but will operate only when conditions develop which will trip the same. It says further that said device is not in use on all railroads, and is not required to be used under the Safety Appliance Act of Congress, or any regulations made in pursuance thereof. It says further that it was not part of the duty of James M. Cox to inspect the same. Except as answered, the averments of said tenth paragraph of the second count of the petition are denied."

2. The Evidence as to the Little Watchman.

The fireman, respondent's witness Goree, testified regarding the "Little Watchman":

> "I thought that that engine was equipped with Wright's Little Watchman. I couldn't say that I had examined that one. I have examined some. It wasn't my duty to examine it; but I thought this engine was equipped with it. I have been on an engine where that Little Watchman worked when the engine got off. That was turning in on Y's, and places like that where the curves are pretty stiff. When it works it opens the air to the atmosphere just like—opens the valve, putting the brakes in emergency just like putting them on from the engine." (R. 48-49)
>
> "A few times in my runnning I have seen that Little Watchman apply on the line of road. As to what would happen to make it apply, some unusual curve, you know, or maybe a swing of the engine that would be too great for it, and it would apply that way; it would put the brakes on immediately after the swing of the engine occurred. I don't know as I have had it happen over two or three times." (R. 49.)

He thought the engineer put on the brakes just as the right-hand switch was struck. He did not see him put them on, only heard the exhaust. He couldn't be certain whether the exhaust he heard was the engineer applying brakes or the Little Watchman applying them (R. 53, 54). *It is perfectly consistent with his testimony that the Little Watchman operated and applied the brakes when the switch threw*

the derailed front trucks violently out of line. If so, it certainly was operative.

Aside from the evidence of petitioner's witness, General Superintendent Madden, which we quoted on petition for certiorari, the only other testimony in the record regarding Wright's Little Watchman was that given by respondent's witness Goff. Goff was Master Mechanic of petitioner Southern Railway Company. But he was examined and vouched for by respondent as her witness. Respondent examined him on direct specifically about the construction, characteristics and functions of the Wright's Little Watchman. He was cross-examined by petitioner about the same subject-matter. Respondent was bound by both the direct and cross-examination of her witness on this subject-matter. We know of no justification for respondent's effort now (Brief, pp. 7, 8, 14) to repudiate his testimony given on cross-examination and to reject as conclusions favorable to his employer part of his evidence given on direct.

On direct examination Goff gave a detailed description of the locomotive involved in the accident, of the front truck and its wheels and safety chains, and of how the front truck would act when derailed (R. 74-78). He then testified as to Wright's Little Watchman.

His best recollection was that it had been in use five, six or seven years; he said that it was used on the majority of the engines of the Birmingham Division (R. 78). He described the mechanism, using drawings No. 8 (R. 117) and No. 9 (R. 118) to describe the mechanical details (R. 78-79). He testified the main body of the Watchman was fastened to the frame of the engine and was connected with the train air line; that if the trigger is moved up or down or in any other direction a certain distance, that opens the valve and permits the air from the train line to go into the atmosphere; that 100 pounds air pressure is carried in the train line, pumped up from the locomotive; drawing off air into the atmosphere reduces train line pressure and applies air brakes; eight or nine pounds drawn off by the engineer

makes a service application of brakes; more than twenty pounds drawn off makes an emergency application (R. 79).

Just as the engineer can make either a service or an emergency application of brakes, depending upon how much air he releases from the train line, so the witness testified that the Little Watchman would make either a service or an emergency application of brakes, depending upon the distance the actuating frame of the Watchman moves the trigger, *i. e.* depending upon the violence of the opening of the valve. If there is a slight or non-violent movement of the trigger and opening of the valve, only a service application of brakes results, but if there is a violent movement the trigger opens the valve enough to make it lock open, and an emergency application of brakes results (R. 80).

He testified that the setting or adjustment of the actuating frame (attached to the front truck) "is still in an experimental stage; we never have determined the exact distance for any of them. It depends on the curvature of the track; in other words, we have some conditions in the yard that are very much different from what they are on the main line, and we have to set them to suit the worst conditions we have, and it is in an experimental stage, that feature of it" (R. 80). In this connection he testified that sometimes a curve will set the Watchman and stop the train (R. 80, bottom). He said it would appear that it would have to work if the actuating frame came in contact with the trigger, and operate to set the brakes (R. 80-81).

He testified that the trip bracket (actuating frame) attached to the front truck and into the center of which the trigger of the Watchman projected, was an opening of approximately five inches vertically and eighteen inches from side to side; that the front truck would have to drop about 2-1/8 inches for the trip bracket to hit the trigger; that supposing the rail and tie plate is 5½ inches high and the trucks got off the track so as to mark the ties, the truck frame would have to fall from 3 to 4 inches (R. 81).

On the other hand he testified that 18 inches horizontal

opening of the trip bracket is allowed to take care of track curvature; that the lesser vertical opening of five inches is allowed "because if the truck drops, we want that to affect the trigger either way almost instantly if the truck gets off. The man that got it up intended to put it on there to stop the engine, instead of the brakes, in case of a derailment; in case the front truck got off" (R. 82).

When he got to the scene of the wreck the front truck and the trip bracket of the Watchman was all disconnected from the trigger and body of the Watchman (R. 82). Goff said that Stewart, Superintendent of Motive Power, had taken the Little Watchman off, for the purpose, he understood, of testing it, but that Goff did not test it (R. 82-83). He did not testify to any defective condition of any part of the Watchman.

He testified, "We don't know whether this watchman worked on this occasion or not. We don't know whether it stopped the train. We don't know whether it put the brake on; we couldn't tell about any indication that the brake had been put on" (R. 83-84).

On page 84 he testified that the frame might move the trigger just enough to apply brakes without locking the valve open, that it might be locked or it might not. "I couldn't answer how much it would have to move before it would lock it, because, as I said at the start, they are in an experimental stage and they vary."

On page 85 he again testified that the adjustment of the size of the trip bracket was still in the experimental stage and he illustrated this by showing that an adjustment which might work on one particular line of road would have to be entirely changed for another line of road.

Thus three times on direct examination respondent's witness Goff testified positively that the device is still in an experimental stage and he testified positively that its proper adjustment has not yet been determined. For her contention that the device was not experimental respondent relies entirely on the fact that the witness testified that this ex-

periment has been carried on for 5, 6 or 7 years and that a majority of the engines on this particular division of petitioner's railroad are equipped with the device which he declared to be experimental. Respondent's position is that such an experiment cannot be conducted for a period as long as seven years and as extensively as on a majority of the locomotives of a particular division of a railroad and still be experimental. Respondent seeks to repudiate as "conclusions favorable to his employer" the direct and positive testimony of respondent's own witness, who knew the facts, that the device is still in the experimental stage.

On cross-examination respondent's witness Goff testified that he was Master Mechanic of the Birmingham Division and that he had supervision of the rolling stock, locomotives, car and shop force and of the repair work on engines, cars, etc. (R. 85). He then testified:

> "This Wright's Little Watchman is just in an experimental stage. That experiment has been going on with engines on this division of the Southern Railway, within my knowledge, for five or six or seven years. As yet, it has never been demonstrated to be a perfect appliance in the operations; and its operation depends on the roadway conditions, the curvature of the track, the height of the track and everything of that kind; and you have to adjust the frame work and the trigger in such a way that it will not block the wheels of the train in the practical operation of the train; and to do that, you have to adjust it for the most extreme conditions that you have to meet in the operation of that engine; and I might say that we have had some delays to trains on account of this device setting; and that would then involve the necessity of increasing the size of the frame work; and also we have had some trip brackets, we have had some of the trip brackets to set at different heights on the same class engines; in other words, we couldn't make them exactly the same thing; we have set them the same thing and had them to set the brakes in emergency on the line of road. This trip bracket is the same thing we have been referring to here as the frame work of the part. It varies on different

class engines; I know of one particular instance that we set the bracket the same distance as another engine of the same class and it set the brakes in emergency on the line of road. We applied them ourselves; they have to be put on entirely. At times it wouldn't set using the same engine." (R. 86).

On re-direct examination by respondent this witness further testified (R. 86-87):

"We have not been using them on all the engines for five or six or seven years; we have been putting them on gradually. We have had some of them at least five or six or seven years. I don't know of a single passenger engine between here and Atlanta that hasn't got one of them; as I said in the beginning there, five or six or seven years; I meant we had been applying a number of them gradually, gradually increasing them. We quit for awhile, and then we started to putting them in again, and have been increasing since."

The only other testimony on the record regarding Wright's Little Watchman was that of petitioner's witness, General Superintendent Madden. He had had seven years active experience as locomotive engineer, two years experience as road foreman of engines having control over engineers and firemen. He then became trainmaster, serving in that capacity approximately twelve years. He served for ten years as division superintendent and thereafter as general superintendent (R. 93-94). As to Wright's Little Watchman, he testified (R. 96):

"On this engine, above referred to was an attachment known as Wright's Little Watchman, and is not a device required by the Interstate Commerce Commission. It does not come on new engines but is brought (bought) by the Southern Railway Company on the outside and applied by it. This device is not used generally by other railroads, and, so far as the undersigned is advised, is not used other than on Southern Railway Company's engines. The use of this device cannot possibly endanger the operation of the train. It is used in the hope that it may apply the brakes and

stop the train in event of derailment of front trucks. My experience with this device is that it sometime works and sometimes will not work, and that it cannot be relied upon with any degree of certainty."

The foregoing is all of the evidence on the record regarding Wright's Little Watchman. The testimony of respondent's witness Goff and of petitioner's witness Madden stands absolutely uncontradicted. We submit that this evidence regarding Wright's Little Watchman fully supports the following statement which we quote from our petition for certiorari (pp. 10-11):

"Petitioner insists that this testimony clearly shows: (a) That this device was not in general use; (b) that it is in an experimental stage; (c) that it is uncertain and cannot be relied upon to operate at all times and under all conditions when the front trucks of a locomotive are derailed; (d) that even in theory it would operate only if conditions developed which would bring the bracket in contact with the trigger; (e) that it was used merely in the hope that it might possibly operate if the front trucks became derailed; (f) that its use could not possibly cause 'unnecessary peril to life or limb' or in any way imperil the safety of the locomotive or train, but on the contrary might possibly add an element of safety not required by law and prevent injury to those on the train; (g) that the use of such a device on locomotives is not required under the rules and regulations promulgated by the Interstate Commerce Commission in accordance with the Boiler Inspection Act; and (h) that the use of this device shows an effort on the part of petitioner to go beyond the requirements of law in promoting the safety of its employees and those on its trains. Petitioner therefore insists that it cannot, under the controlling federal law, be penalized merely because on this particular occasion the device was not effective to provide the additional safety element beyond the requirements of law and to prevent the results of an accident otherwise caused.

"The inescapable fact is that if this same locomotive had never had the 'Little Watchman' applied to it, it would have complied with all requirements of federal

law, and under the same circumstances the same accident would have happened just as it actually did, without any liability on petitioner as for violation of the absolute duties imposed by the Boiler Inspection Act. With the device actually applied, but failing to operate to set brakes in the particular circumstances, the locomotive was identically as safe to operate and as free from 'peril to life or limb' as if the device had never been applied at all."

On the Foregoing Testimony Liability was Imposed on Petitioner as for Violation of an Absolute Duty Under the Boiler Inspection Act on the Mere Fact that the Little Watchman Failed to Stop the Train and Thus to Intervene to Prevent the Final Derailment and Death.

The charge of the trial court, considered in its entirety, is confused, inconsistent within itself, and so intermixes conflicting theories as to liability for negligence and as to liability for violation of charged absolute duty under the federal statute, that the jury could not be expected to have disassociated good parts of the charge from the bad. We of course do not assert that the entire charge was erroneous.

As we have heretofore pointed out, the allegations of respondent's petition regarding Wright's Little Watchman did not allege a violation of the Boiler Inspection Act, did not allege that the failure of that device to function to stop the train was a violation of the Boiler Inspection Act or of an absolute duty imposed by that Act. The allegation seems to have been a charge of common law negligence in failure to inspect the device and keep it in operating condition. The allegation was so stated to the jury by the trial court (R. 138-139, 141 middle).

Petitioner's answer to the allegations concerning Wright's Little Watchman, as heretofore shown, were a denial of failure to inspect and to keep in condition and amounted to an allegation of due care and a denial of com-

mon law negligence. They were so outlined to the jury by the trial court (R. 143).

The charge clearly divided the causes of action based upon alleged negligence from that submitted by the court under the Boiler Inspection Act. After charging the law of negligence, the trial judge (R. 145) took up as a distinct and separate subject the branch of the case dealing with asserted violation of the federal statute. This clear division of the two branches of the case is shown by the following paragraph of the charge (R. 145):

> "I will now charge you, gentlemen, upon the aspect of the plaintiff's case which deals with alleged negligence other than the charge of violation of what is known as the Safety Appliance Act and amendments thereto. I will later charge you separately as to the effect of any violation of the Safety Appliance Act. The law which is now being given to you is applicable to all the other charges of negligence contained in the two counts of the petition, except those relating to the Safety Appliance Act."

The court then proceeded to charge the jury under the negligence branch of the case as to assumption of risk, negligence and proximate cause (R. 145-147). The court then again outlined to the jury the allegations concerning Wright's Little Watchman (R. 147 bottom) and concluded (R. 148 top) as to these allegations:

> "The allegation is that this contrivance was not in working or functioning order at the time of the derailment, that the same failed to apply the brakes as was its design and purpose, and that had the 'Watchman' functioned, the train would have stopped long before striking the right hand switch."

Although, as we have pointed out, there was no allegation anywhere in respondent's petition of a violation either of the Safety Appliance Acts or of the Boiler Inspection Act, the only reference to a federal act in the pleading be-

ing to the Employers' Liability Act, the trial judge then quoted to the jury Section 2 of the Boiler Inspection Act (45 U. S. C. 23) and as to it said (R. 148 middle):

> "You are further instructed that the law to which the court has called your attention applies to the locomotive, its boiler, tender and all parts and appurtenances thereof, and the court charges the jury that a contrivance built on the engine and attached to certain apparatus connected to the engine, and which was so designed that under certain conditions the derailment of the front wheels would trip a valve and thereby apply the air on the brakes of the train, is a part and appurtenance of the engine or locomotive; provided, gentlemen, you find the following to be true:"

The proviso then stated by the court was that if the device was in an experimental stage, that if it was not perfected, that if it would work sometimes and at other times would not, that if it had not been in general use on this railroad or on other railroads for a sufficient length of time to be a fixed and permanent and reliable device for the purpose of which it was used, and if its limited and experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of the device, then "in that event the failure of this device to work or to perform its function would not be charged against the defendant *as negligence*, and the defendant would not be liable for a failure on the part of this device to operate properly." (R. 148-149; emphasis added.)

We submit that there was no evidence upon which the jury was justified in finding that this device was not experimental or that it was perfected, or that it always worked as intended if in proper condition, or that it had become a reliable device which could be depended upon. We submit that it was error for the court to authorize the jury to make such finding. In any event the proviso as stated by the court in its charge was limited to a proviso that if the de-

vice was experimental, etc., the failure of the device to work *would not be negligence.* After stating this proviso as a limitation on negligence liability the court then returned to the rule of the Boiler Inspection Act and charged that Act as imposing an absolute liability on petitioner without any limitation or condition. In this part of the charge, which the jury was bound to have considered as a charge separate and distinct from all theories of negligence, a portion of the charge specifically raised as erroneous in the specifications of error (Petition for Certiorari 20; R. 132, 3rd), the court turned from questions of negligence and charged the jury specifically:

> "If you find, gentlemen, that this device was used, as I say, so generally used for such length of time by the defendant that it became a part and appurtenance of the engine, and that the decedent was authorized to rely on it at this particular time by the conduct of the defendant in putting it on the engine and using it, under all the circumstances, then the following law would apply and this would be considered a part and appurtenance of the engine or locomotive at this particular time. I charge you that the duty put upon the defendant railway by the Act of Congress which the court has called your attention to, to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to operate in the service to which the same are put, is an absolute duty on the railway. It is not subject to any limitation or condition, is positive and not dependent, and unqualified by any consideration whatever. Now, gentlemen, if the defendant at that particular time put this device there for the purpose for which it was intended, it was the duty of the railroad company at this time to see that it was in proper working order, whether it was in an experimental stage or not." (R. 149-150).

Thus, after making the question of whether the device was experimental or not a proviso bearing upon the applicability of the law of negligence, when the judge charged specifically under the Boiler Inspection Act he charged an

absolute and unconditional duty, unqualified by any consideration whatever, and charged that that duty existed whether the device was experimental or not. Aside from all else, this was clear error.

The court of appeals clearly held that the Boiler Inspection Act applied, although that court confused the Boiler Inspection Act both with the Safety Appliance Acts and with the Federal Employers' Liability Act. After quoting the gist of Section 2 (45 U. S. C. 23) of the Boiler Inspection Act, and confusing that as an amendment of the Federal Employers' Liability Act rather than as an amendment of the Safety Appliance Acts, although referring to the Liability Act of April 22, 1908, as being the Safety Appliance Act, the appellate court held (R. 159):

> "This law imposes on carriers in interstate commerce the absolute duty to keep their locomotives and all the parts and appurtenances thereof free from defects and safe to operate. It is not a question of negligence, but the railway company is bound to see that all parts and appurtenances are in a safe and proper condition."

And again (R. 160) the appellate court specifically held:

> "5. A safety device constructed and designed for the purpose of automatically applying the airbrakes whenever the front trucks of a locomotive engine leave the rails from any cause, called a 'watchman,' which is attached to the front trucks under the boiler of the engine, some 35 or 40 feet in front of the cab where the engineer sits, and which will, if in proper working condition, when the trucks leave the rails and drop down as much as two and one half inches, trip a trigger, which opens a valve and puts the airbrakes on, and will stop the train within 200 yards; and which in this case had been attached to the locomotive for from five to seven years, and with which all of defendant's locomotives on this division are equipped, is properly a part and appurtenance of the locomotive, within the purview of the Federal safety-appliance laws, requiring a locomo-

tive engine of an interstate railway company and all parts and appurtenances of such locomotive to be in proper condition to operate safely, and that they be kept in that condition, although the appliance is not one that is required by such Federal laws to be attached to the locomotives of interstate railway companies."

And again (R. 161) the appellate court said:

"This is so even though the Federal safety-appliance act and the rules and regulations of the interstate-commerce commission relative to interstate carriers do not specifically designate this particular contrivance as a safety device which must be placed upon the locomotives of interstate carriers, because when the defendant placed such device upon its locomotives it became a 'part and appurtenance' thereof within the purview of the Federal statutes relative to safe appliances of interstate carriers. The fact that the little 'watchman' was not a device in general use by other railway companies, and was not a standard safety appliance, would not prevent it from becoming a part and appurtenance of the locomotive of the defendant. If a part and appurtenance thereof, then, under the safety-appliance laws, it must be at all times kept in proper working condition, and if, as a result of the failure of such appliance to be in proper condition and to work on this particular occasion, the decedent, an engineer of the defendant railway, met his death, the railway company would be liable. It was an absolute duty on the part of the railway company to see that its locomotive, boiler, tender and 'all' parts and appurtenances thereof were in proper condition and were kept in proper condition."

Thus, entirely aside from all questions of negligence in failure to inspect and maintain, the courts below, applying the Boiler Inspection Act, held that that Act imposed an absolute and unqualified duty upon petitioner to see to it that this device would work as it was designed and hoped that it should work in spite of the experimental nature of the device, and in spite of the fact that it is not a device re-

quired either by the Safety Appliance Acts or by the Boiler Inspection Act or by any of the orders and rules of the Interstate Commerce Commission promulgated under authority of the Boiler Inspection Act, and although the rules for inspection issued by the Commission under that authority do not provide for its inspection and testing, and liability was imposed upon petitioner, as for a violation of this absolute and unqualified duty, upon evidence which merely tended to show that the device did not on this occasion function to stop the train after the initial derailment caused by the mischievous act of the child in placing the rock on the track and did not thereafter intervene to interrupt the chain of causation and to prevent the final derailment and save the life of the engineer.

There was no charge by the trial court and no holding by the appellate court that there could be a violation of the Boiler Inspection Act only if the failure of the Little Watchman to function created a condition causing "unnecessary peril to life or limb" within the very language of the Act itself. No question of unnecessary peril to life or limb was submitted to the jury. It was authorized to find that a failure of the device to function so as to stop the train after the initial derailment was a violation of petitioner's absolute duty under the Boiler Inspection Act. This amounted to authorizing the jury to find that a failure of the device to function so as to raise the safety standard of the particular locomotive above that required by the Act was a violation of an absolute duty imposed by that Act.

ARGUMENT.

I.

ONLY THE QUESTION AS TO THE APPLICABILITY OF THE ABSOLUTE RULE OF THE BOILER INSPECTION ACT TO THIS NON-REQUIRED DEVICE IS RAISED.

As was said on petition for certiorari (p. 11), the indisputable fact is that if this same locomotive had never had "Wright's Little Watchman" applied to it, it would have complied with all requirements of federal law, and yet under the same circumstances the same accident would have happened just as it actually did, and there could have been no suggestion that there was any violation by petitioner either of the Boiler Inspection Act or of any provision of the Safety Appliance Acts and no *absolute liability* under any of those Acts could have been imposed on petitioner.

It is further undisputed on the record that, as testified by General Superintendent Madden (R. 96), "The use of this device cannot possibly endanger the operation of the train." It necessarily results that the locomotive with the device installed, even if not operative, was exactly as safe as the locomotive would have been without the device and could not possibly have entailed any greater peril to life or limb.

The function of the device was not to prevent a derailment. It was only designed to operate after a derailment had occurred. It was installed in the hope that after the occurrence of a derailment, otherwise caused, it might operate to limit or reduce the seriousness of the damage resulting therefrom. It could not possibly contribute positively to a derailment or to any result thereof or to any other danger. If it should operate, it could only have effect by becoming an intervening cause, intervening to interrupt the chain of causation flowing from the *causa causans* of the derailment. Its role in this case was purely negative.

It merely failed to intervene to interrupt the natural sequence of result flowing from the act of the outsider in putting the rock on the track.

The narrow but important question presented is whether its failure to assume an active role, to operate to apply brakes and stop the train after the derailment caused by the rock, constituted a violation of *an absolute duty*, asserted to have been imposed upon petitioner by the Boiler Inspection Act, to see to it that the device should so operate in any event, making petitioner absolutely liable as insurer for the failure of the device so to operate for whatever reason.

If that is the law, then, even though the use of this device by petitioner, in the laudable effort to achieve if possible a higher standard of safety than that required by federal law, may have saved hundreds of lives during the five to seven years during which petitioner has been experimenting with the device, it would seem to be necessary for petitioner for its self protection to remove the Little Watchman from all its locomotives and thus to *lower* their standard of safety to that required by the Boiler Inspection Act. At that lower standard of safety petitioner would be free from liability as for violation of absolute duty.

If the law is as respondent asserts, it necessarily follows, and respondent is forced to argue on brief, that the Boiler Inspection Act does not set up one uniform and universal rule or standard of safety applicable to all carriers, but sets up two rules or standards: a minimum rule, applicable to those carriers which content themselves with complying with the rules established by the Interstate Commerce Commission; and a maximum rule, applicable to those carriers which make efforts to achieve a higher standard than that required by the law.

Such a concept of a minimum and a maximum standard is difficult to grasp. The maximum standard would have no upward limit save the inventive genius of man. As genius

and invention raise an individual safety standard to greater and greater possible heights, this shifting and fugitive *maximum* rule of the law would pursue it, fix it at the highest point of possible attainment and at that point would make it *absolute*. Such a concept is hardly possible philosophically. It certainly is wholly unreasonable legally.

We reiterate what was said on brief in support of petition for certiorari (p. 21)—we do not contend that where a railroad voluntarily installs on a locomotive a device not required by the Commission's rules it would not be liable *under the negligence rule of the Employers' Liability Act* if negligent installation or negligent failure to maintain should proximately cause injury.

The question is whether the absolute rule of the Boiler Inspection Act pursues such voluntary effort to achieve a higher than the legal standard and transmutes the effort into an absolute and mandatory rule of conduct, the failure to attain which imposes liability at all events.

II.

ANALYSIS OF THE BOILER INSPECTION ACT AND CONSIDERATION OF THE COMMISSION'S RULES THEREUNDER.

The pertinent section of the Boiler Inspection Act, which sets up whatever legal standard of safety is set up by the Act is Section 2 (45 U. S. C. 23). It is one sentence, which we have always understood to be made up of three interrelated and mutually modifying clauses:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the pro-

visions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

After providing for appointment of mechanical experts, a chief inspector, and assistant chief inspectors, and for their offices in Section 3 (45 U. S. C. 24-25), for inspection districts and district and additional inspectors in Section 4 (45 U. S. C. 26-27), the Act then in Section 5 (45 U. S. C. 28), as construed by this Court in the recent power reverse gear case, *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, confers upon the Commission plenary legislative power, not merely to approve rules for inspection initiated by carriers or by the Chief Inspector, but itself to establish by direct proceeding not only rules for inspection but also rules requiring the equipment of locomotives with such safety devices as the Commission shall find are necessary to make them achieve the safety standard imposed by the Act; that is to render them "in proper condition and safe to operate" in the sense that "the same may be employed in the active service of such carrier without unnecessary peril to life or limb."

The responsibility for rules adequate to attain that standard was imposed by Congress on the Commission. The Commission sets the standard of safety under the Act. It imposes the mechanical requirements compliance with which constitutes compliance with the Act. *United States* v. *Baltimore & Ohio R. Co., supra; Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611; *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521.

The Act became law February 17, 1911. On June 2, 1911, the Commission entered its first order in pursuance of that statute. (See official pamphlet of Laws, Rules, and Instructions, pp. 15-17). In that order it was recited that certain carriers had filed their rules and instructions for inspection within three months after enactment, as required by Section 5 of the Act; that other carriers had filed no rules; that the Chief Inspector had thereupon pre-

pared rules for the carriers which had not filed; that the whole matter came on for hearing and establishment of rules and instructions; that the carriers which had filed rules asked "that such of said rules and instructions which did not fulfill the requirements of the proposed rules and instructions prepared by the chief inspector be modified to the extent necessary to conform thereto, and that such of said rules and instructions as prescribed *a higher standard* than that required by the rules and instructions prepared by the chief inspector be regarded as withdrawn from consideration, and joined in a request that such rules and regulations as had been prepared by the chief inspector and approved by the Interstate Commerce Commission *be established with uniformity for them and all other carriers subject to the act.*" (Italics ours.)

Evidently considering that that suggestion was in accordance with the legislative purpose to establish one uniform mechanical standard for compliance with the safety standard imposed in general terms by the Act, the Commission adopted that course, approved the Chief Inspector's rules and ordered (p. 17, official pamphlet):

> "*It is ordered,* That said rules and instructions for the inspection and testing of locomotive boilers and their appurtenances, as follows, be, and the same are hereby, approved, and from and after the 1st day of July, 1911, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: *Provided,* That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents."

Thus the Commission itself, in its original order, fixed the minimum mechanical requirements, compliance with which would constitute compliance with the safety mandate of the law, but also recognized that carriers might do just what petitioner in this case has done, i. e., undertake

voluntarily to go beyond the legal requirement and adopt measures "tending to a greater degree of precaution against accidents" than the law required.

The Commission was manifestly fearful that the establishment of minimum requirements under the law might deter railroads from experimentation and initiative in attempts to adopt measures "tending" to achieve higher than the legal standards and wisely negatived any intention to interfere with such attempts.

It is quite evident that the Commission did not think that when such an attempt was made an absolute rule of the statute pursued the attempt and impinged upon it at the highest point of possibility it might attain, fixing it at that point as an absolute legal standard which must be attained. It is quite evident that the Commission considered such attempts as above or beyond the law, not within its absolute rule, else the Commission would certainly have gone further and adopted, as part of the legal standard, such additional voluntary rules as might be adopted by any carriers "tending to a greater degree of precaution against accidents."

Following that original order, as the Act has been broadened by subsequent amendments so as to cover not only the boiler but the entire locomotive and tender, the Commission has correspondingly broadened its rules and instructions, has added new elements to the mechanical legal standard of safety.

It has been by amendments to these rules and instructions that the Commission has required installation, maintenance and inspection of additional safety appliances found by it to be necessary to prevent "unnecessary peril to life or limb," cab curtains, 142 I. C. C. 199, 201, and automatic fire doors, 151 I. C. C. 448, 450. It was by amendment to these rules that the Commission undertook to require installation of power reverse gears. See *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 456.

If the Commission, upon proper hearing, sufficient evi-

dence, and competent finding that the use of such device and the keeping it in operating condition is necessary to prevent "unnecessary peril to life or limb," should decide to enter such an order, it undoubtedly has the power under the Act to require the installation, maintenance and inspection of Wright's Little Watchman or if some other device intended to apply brakes mechanically in case of a front truck derailment, provided it can find any such device so perfected and reliable that its requirement is consistent with making it a part of the absolute standard established under the Act.

The Commission has not found such a device or at least has not made it a part of the legal standard. It must know of Wright's Little Watchman. Its inspectors have been inspecting petitioner's locomotives throughout the seven or so years of petitioner's experimentation with the device. They do not inspect the device itself because it is not covered by the Commission's rules for inspection, but they must know of the existence of the device and of its use by the petitioner. The Commission's inspectors investigated this very accident and inspected the locomotive after the derailment, in company with officials of petitioner (R. 95-96). Of course no use could be made in the case of their report or of the Commission's report of the accident, since the Act in Section 8 (45 U. S. C. 33) expressly provides:

> "Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

If the Commission should require the device, by amendment of its rules, then the device would come under the absolute duty imposed by the Act. But we think that until it is so required it does not come within the absolute

duty imposed by the Act. Its use is within the express permission to carriers to adopt additional means and methods "tending to a greater degree of precaution against accidents" than that required under the Act. Its use is in no wise inconsistent with the Commission's rules. *It cannot endanger the operation. It cannot make the locomotive less safe than it would be without it.*

If the locomotive without the device complies with the legal standard—and this one would have so complied—then the use of the device, even if it be inoperative because not perfected, because adjusted to maximum rather than minimum curvatures and track conditions, or for any other reason, cannot possibly make the locomotive less safe to operate without unnecessary peril to life or limb, cannot reduce the safety standard of the locomotive below what it would be without it, viz. a standard in compliance with the law.

If it operates as hoped, and stops a train after a front truck derailment, then its operation accomplishes the achievement of a "higher degree of precaution against accidents" than that required by the law. How then could its failure to achieve that higher standard constitute a violation of an absolute duty under the Act?

III.

THE BOILER INSPECTION ACT SETS ONE UNIFORM MINIMUM STANDARD OF SAFETY, NOT TWO, A MINIMUM AND A MAXIMUM.

Respondent's argument treats the first modifying clause of Section 2 of the Act, "unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put," as being entirely distinct and disconnected from all that follows in the sentence. That modifying clause is said to establish an absolute maximum rule of safety which applies to any device which a carrier may

place on its locomotives, even though not required by the Commission's rules.

Respondent's argument will not even admit of reading the next clause following the comma, "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," as a limitation on or modification of the first modifying clause. There could be no contention on the evidence in this case that the presence of an inoperative Little Watchman on this locomotive caused any unnecessary peril to life or limb, any more than if the locomotive be operated without the device affixed to it, which the law allows.

Respondent's argument evidently considers the second, or "unnecessary peril to life or limb" clause, and the third clause as to inspection and meeting the tests of the Commission's rules, together as establishing the second or *minimum* rule or standard set by the statute, and considers that the first modifying clause standing alone sets up the so-called first or maximum rule or standard.

We can only read the one sentence of Section 2 as one sentence. It seems to be tolerably plain and understandable English. It seems to set up one statutory rule or standard of safety for locomotives and tenders.

As we read it it means that it is unlawful to operate a locomotive unless the locomotive, its boiler, tender and all parts and appurtenances thereof are in such condition and so safe to operate as not unnecessarily to imperil life or limb, and that the mechanical test as to whether they are in that condition is the yardstick applied by the Commission's rules for inspection and testing.

In the power reverse gear case, *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 462, this Court held that even the Commission's rule-making power is limited by the clause as to unnecessary peril to life or limb; that it could not require power reverse gears except upon a competent finding that use of a locomotive "equipped with hand reversing gear as compared with power reverse gears causes unnecessary peril to life or limb."

In that case the Court recognized not only that the Act does not, in its general language, impose a statutory rule of absolute safety but also that it does not authorize the Commission to undertake to impose any quasi-legislative rule of absolute safety and that such a rule would be impossible. "The operation of an engine, however equipped, inolves 'danger to life or limb'." it was there said (p. 462). And it was held that "The Act does not confer upon the Commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem desirable."

We submit that where the Commission has not required such a device as the Little Watchman, has established no rules for its inspection and testing, where the device cannot possibly endanger the train, the Act has not given juries throughout the land such discretionary commissions to find that a failure of the device to function so as to create a higher standard of safety than that established by the Commission under the law is a violation of an absolute duty imposed by the Act.

If we read correctly the fusible plug case, *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, it held that it was not to be left to the "varying and uncertain opinions and verdicts of juries" whether the absence of a certain device not required by the Commission's rules was a violation of the standard of duty imposed by the law and imposed upon a railroad an absolute liability.

The absence of a non-required device is just as complete a failure as the presence of a non-required device which fails to function in a way to achieve a higher standard of precaution than the Commission under the Act has required. The failure of such a device to function or to operate successfully might result from negligence. If under ordinary rules of negligence a proximate causal relation between such negligence and an injury can be established, that is one thing. It is a very different thing to authorize a jury to impose liability as for violation of an absolute,

unqualified duty under the Boiler Inspection Act, by reason of the failure of such a device to achieve a "higher degree of precaution against accidents" than has been authoritatively fixed under the Act.

If we read *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605, correctly the Act puts it exclusively within the jurisdiction of the Commission "to prescribe the rules and regulations by which fitness for service shall be determined." It is the Commission which sets the standard by which conformity with the general mandate of operating safety of the statute is to be measured. For this reason the Court held that State Commissions were without power to require cab curtains and automatic fire doors.

The question here presented may well be tested by supposing a case arising after this Court's decision in the *Napier Case* and before the Interstate Commerce Commission amended its rules so as to require cab curtains and automatic fire doors. Some railroads had in that period voluntarily installed cab curtains and fire doors in an effort to raise their particular locomotives to a higher standard of safety than then required under the Act. If that were not so the Commission could not have made use of the experience of railroads with cab curtains and fire doors in its orders in 142 I. C. C. 199 and 151 I. C. C. 448. Suppose in that period a railroad had a locomotive on which cab curtains had been voluntarily installed and the curtain was torn or fell off and a fireman was exposed to drafts as a result and contracted pneumonia; or suppose a locomotive on which an automatic fire door had been voluntarily installed and by reason of its failure to operate a fireman was exposed to glare and heat and injured. Could a jury have been instructed to find that a failure of the cab curtain to protect the fireman from drafts or a failure of the fire door to operate was a violation of an absolute duty under the Boiler Inspection Act? We think not. After the Commission required cab curtains and fire doors

a different question would be presented, but before that requirement there could have been no absolute duty under the Act. There might have been liability for negligence, but that, again, is a different question.

The postulated cases are identical with ours.

Respondent argues that while this Court did hold in the fusible plug case, *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, that a jury was not authorized to find that a fusible plug in the boiler was necessary to meet the standard of safety of the Act, yet if the carrier had voluntarily used a fusible plug and it was defective and an explosion resulted the railroad would have been guilty of a violation of the Act. Respondent assimilates that to our case, but we think it quite different.

In the case assumed by respondent the Act would have been violated because a defective condition in the boiler (a defective plug, regardless of whether fusible or non-fusible) created a condition of unnecessary peril to life or limb. Liability would have been imposed not because a *fusible plug* was used, but because a *defective plug* was used. Plugs are necessary parts of boilers. The rules of the Commission (Rules 1 to 55) cover in the greatest detail the inspection of both exterior and interior of boilers and of all parts thereof a defective condition in which might make a boiler unsafe. While the use of fusible plugs, instead of non-fusible, is left discretionary with the carrier, if they are used Rule 14 expressly covers their inspection (Pamphlet, p. 49) as follows:

> "14. Fusible plugs—If boilers are equipped with fusible plugs they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection."

So in respondent's assumed case the fusible plug would have been expressly covered by rule.

In our case there is not only no requirement that a Little

Watchman be used but there is no rule by which the Commission has recognized that device or provided for its inspection and testing to determine whether its condition is such as to violate the statutory rule.

We cited other cases on our brief in support of petition for certiorari which in our opinion support the view of the law which we take. We do not elaborate those cases again here.

We do, however, suggest to the Court that the courts below confused the Boiler Inspection Act with the Safety Appliance Act. The absolute duty imposed by the Safety Appliance Act is distinctly different from the rule imposed by the Boiler Inspection Act. In the Safety Appliance Act Congress did not in general terms lay down a rule of safety and authorize the Commission to set the mechanical standard by which such rule was to be admeasured. In that Act Congress made its own mandatory requirement as to installing particular devices and as to how they should function and the condition in which they must be kept.

It required a power driving-wheel brake (45 U. S. C. 1) and that duty is absolute and failure to comply results in absolute liability.[1]

It required "couplers coupling automatically by impact, and which can be uncoupled without necessity of men going between the ends of the cars." (45 U. S. C. 2). That imposes an absolute duty and if the couplers cannot be uncoupled without necessity of men going between cars and an injury results absolute liability follows.[2] It required "secure grab irons or handholds" (45 U. S. C. 4) and a failure to comply with that requirement imposes absolute liability.[3] It required drawbars of standard height (45 U. S. C. 5) and a failure to have them of that height

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[1] *Texas & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33.

[2] *Pennsylvania Co.* v. *United States*, 241 Fed. 824; *Norfolk, etc., R. Co.* v. *United States*, 191 Fed. 302; and many other cases.

[3] *St. Joseph & G. I. Ry. Co.* v. *Moore*, 243 U. S. 311.

violates an absolute duty.[1] It required "secure sill steps and efficient hand brakes" and "secure ladders and secure running boards" (45 U. S. C. 11) and a failure to have them so is a violation of an absolute duty and results in absolute liability.[2]

Similarly in the later Ash Pan Act of May 30, 1908, (45 U. S. C. 17) Congress mandatorily required "an ash pan, which can be dumped or emptied and cleaned without the necessity of any employees going under such locomotive." If an ash pan cannot be dumped without the necessity of an employee going under the engine absolute liability would undoubtedly result.

It was perfectly possible and practical for Congress to lay down in the Safety Appliance Acts these mandatory requirements as to essential and comparatively simple safety appliances such as power brakes, automatic couplers, grab irons, handholds, running boards, ladders, sill steps, and ash pans. It is perfectly possible and practical for juries to determine when these requirements have been complied with.

But when Congress came to deal with safety of locomotives and boilers the infinite complexity of steam locomotives presented engineering and mechanical problems of the greatest delicacy, which Congress could not undertake to regulate by detailed legislative prescription as to design, functioning, testing, condition, etc., of particular parts and appliances. As was said in the *Groeger Case* (266 U. S. 521, 530), that Act "required a condition which would permit use of the locomotive without unnecessary danger." But as held in the *Napier Case* and in the *Power Reverse Gear Case*, it lodged final authority in the Commission to make the rules and regulations under which the fitness for service, enjoined in only the general terms of the statute, is to be measured. If the locomotive meets the test of the Commission's rules it complies with the mandate of the statute. If it fails to meet that test it violates the statute.

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1 *St. Louis, etc., R. Co.* v. *Taylor*, 210 U. S. 281.

2 *Chicago, etc., R. Co.* v. *United States*, 220 U. S. 559.

While the duty is absolute, as held in the *Groeger Case*, it is not a duty to achieve *absolute* safety, it is not a duty to achieve such safety as a jury may think the carrier should attain, it is an absolute duty to meet the reasonable test or measure of safety established by the Commission under authority of the Act. Here Congress could not set up the exact mechanical measure of the statutory rule of safety, but it authorized the Commission to set it up, wisely providing for expert assistance from the carriers and from expert federal inspectors.

The cases relied on by respondent practically without exception deal with safety devices specifically required by the Safety Appliance Act. We submit they are not in point here.

We think this necessary distinction was caught and well expressed by the Supreme Court of Wyoming in *Chicago, B. & Q. R. Co.* v. *Murray*, 40 Wyo. 324, 277 Pac. 703, 706, where it was said:

> "There can be no doubt that the Boiler Inspection Act was 'enacted for the safety of employees' within the meaning of sections 3 and 4 of the Employers' Liability Act (citing cases). It differs, however, from the Safety Appliance Acts (citing them), in that the latter require certain named appliances to be installed and maintained, while the Boiler Inspection Act requires in general terms that the locomotive and all parts and appurtenances thereof shall be kept in proper condition and safe to operate in the service to which the same are put. Further, the Boiler Inspection Act, as construed by the courts, confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives, and to prescribe rules and regulations by which fitness for service shall be determined. Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 612.
>
> "When a carrier fails to install and maintain a safety appliance required by a specific rule promulgated by the Interstate Commerce Commission under authority of the Boiler Inspection Act, we may assume that the consequences would be the same as though

there had been a violation of some provision of the Safety Appliance Acts. We doubt whether it can be said that the defendant in the case at bar had violated any rule of the Commission. The only rule that is called to our attention is rule 120, above, requiring that locomotives be equipped with proper sanding apparatus which shall be maintained in a safe and suitable condition for service. But the hand sander was only a secondary sanding apparatus, and there was no evidence that the air sander was not in safe and suitable condition and a sufficient compliance with the rule."

Thus in *Lancaster & Wight* v. *Allen*, 110 Tex. 213, 217 S. W. 1032, the Supreme Court of Texas reversed a recovery against railroad receivers predicated on a finding that injury was caused by a negligent condition of a wheel flange, because the trial court refused a requested charge that if the flange was in accordance with the rules enacted by the Commission, in regard to wheel flanges, under the Boiler Inspection Act, the jury would not be warranted in finding negligence. The Court said:

"It is true that, in the absence of a violation of some other statute, the common carrier's liability under the federal Employers' Liability Act, for injury or death, by reason of defect in equipment, does depend on whether the defect was due to the carrier's negligence. The finding of negligence on the part of the common carrier in such cases is indispensable to liability. But where a statute requires the common carrier to furnish certain equipment, or to furnish equipment in a certain condition, and the carrier violates the statute, and thereby causes death or injury to an employee, and the violation of the statute fixes liability for the consequent damages. Hence, with respect to the flange of the wheel in this case, the sole question was as to whether it was in a condition prohibited by the rules of the Interstate Commerce Commission, and therefore by the act of Congress; and inquiry was utterly futile as to whether the receivers had exercised or had failed to exercise, any degree of care to render the flange safe."

Conversely, we submit that where neither the statute nor the Commission's rules required the Little Watchman in our case, where it could not possibly endanger the train or the safety of employees or others, where there is no showing that the locomotive violated any of the Commission's rules, and where the locomotive would have fully complied with the Boiler Inspection Act if the Watchman had never been installed and was exactly as safe with the device installed and non-operative, it cannot be said that a failure of the device to function so as to attain a higher standard than that required by the law was a violation of an absolute duty under the law.

Unless we are correct in our thought that the Act imposes one uniform standard, that of complying with the Commission's rules, rather than two standards, a minimum standard of compliance with those rules where devices are required by them and a maximum rule imposing an absolute duty as to all devices voluntarily applied by carriers but not required, then the asserted *maximum* requirement is an absolute statutory duty to comply with a standard of safety not defined in the statute or elsewhere with sufficient precision to enable carriers to know when they are complying. Such standard is wide open for juries to impose whatever measurement they may see fit by their "varying opinions and verdicts."

That would amount to a statutory attempt to impose an absolute rule requiring absolute safety, or safety without definition, and the gravest doubts would arise as to the constitutionality of such an attempt under the Fifth Amendment.

IV.

IF THE ACT DOES IMPOSE TWO RULES INSTEAD OF ONE, THE SUPPOSED MAXIMUM RULE IS CERTAINLY LIMITED BY THE WORDS "WITHOUT UNNECESSARY PERIL TO LIFE OR LIMB."

If, however, there are two rules or standards of safety set up by the Act, one a general rule of safety to apply to

devices not required by the Act or by the Commission's rules, the other a minimum rule to apply to all devices covered by the Commission's rules, then it is so plain as to be hardly debatable that the general rule of the statute, applicable to non-required devices, is not a rule of absolute safety, and is not a rule requiring operation of such a device in any event, but is a rule limited by the words "without unnecessary peril to life or limb."

Necessarily, from the language of the Act and from the decisions of this Court, if two rules are set up, both the maximum or general rule of safety to operate and the provision empowering the Commission to establish minimum rules as to required equipment, are modified by those words "without unnecessary peril to life or limb."

The maximum standard, if there be two, is clearly that the locomotive, its boiler, tender, and all parts and appurtenances thereof not required by the Commission's rules shall be "in proper condition and safe to operate in the service to which the same are put" in the sense "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb."

This case was not put to the jury below or affirmed by the Appellate Court of Georgia, however, upon any such concept of the law. The trial court did not authorize the jury to find the Act violated if the failure of Wright's Little Watchman to function to stop the train created a condition of unnecessary peril to life or limb. He authorized them to find the failure of the device to function was a violation of an absolute duty to have the engine safe to operate.

The locomotive, which would have fully complied with the Act if the device had never been installed, which in that state as matter of law would have involved no unnecessary peril to life or limb, manifestly involved no such peril with the device installed and failing to operate, because it was exactly as safe in the one state as in the other.

It would be a wholly different case if a carrier had voluntarily installed a non-required safety device, a defective condition in which might create a peril which would not have existed without it and thus make the locomotive less safe than if the device had not been installed.

V.

REPLY TO RESPONDENT'S ARGUMENT THAT THE LITTLE WATCHMAN IS COVERED BY COMMISSION RULE 106.

Respondent argues (Main Brief 23) that Rule 106 (Pamphlet, p. 61) covers the valve of the Little Watchman and requires its inspection and that therefore there was a violation of an express rule. The rule deals with the air brake system. It does require inspection to ascertain "that the brake valves work properly in all positions."

If it be assumed that the valve, which is only one element of the Little Watchman, is within that rule, the fault of the argument is that no such question was submitted to the jury below and no such theory was dealt with by the courts below. There was no charge in pleading of a violation of that rule. No question of a violation of that rule was submitted to the jury and the record does not disclose that respondent advanced the theory of a violation of that rule at any stage of the case below.

To meet a cause of action on that theory is a very different thing from meeting a case asserting that a failure of the Little Watchman as an entire device to stop the train was a violation of an absolute duty under the Act to have it in such condition that it would be effective to stop the train.

CONCLUSION.

For the reasons assigned in the petition for certiorari and supporting brief and in this brief, we respectfully submit that the judgment and decision of Court of Appeals of Georgia herein should be reversed.

Respectfully submitted,

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